APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 6, 2004]

No. 03-16068
D.C. No. CV-99-01366-PGR

EMMANUEL SENYO AGYEMAN,
Plaintiff-Appellant,

v.

CORRECTIONS CORPORATION OF AMERICA; ZURICH INSURANCE COMPANY; GERBER, Assistant Shift Supervisor; VALADEZ, Unit Manager; D. RIVAS, Assistant Warden; LAURENCE, Chief of Security; H. MOHN, Disciplinary Hearing Officer; JOHN GLUCH, Warden; SAMBERG, Warden; SARAH CANNON, Internal Controls Officer; LOPEZ, Shift Supervisor; CALDERON,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
November 1, 2004—San Francisco, California

Before: Betty B. Fletcher, John T. Noonan, and Sidney R. Thomas, *Circuit Judges*.

OPINION

NOONAN, *Circuit Judge*:

Emmanuel Senyo Agyeman appeals the judgment of the district court in this *Bivens* action in favor of the defendant employees of the Corrections Corporation of America. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Holding that the district court abused its discretion in declining to appoint counsel for Agyeman, we vacate the judgment and remand.

PROCEEDINGS

Agyeman, a native of Ghana, entered the United States in 1988. In 1991, he married a United States citizen, Barbara Levy, who subsequently filed an application for adjustment of his status. Barbara Levy, because she was hospitalized, was unable to attend an INS-scheduled interview, and the adjustment was denied. On July 28, 1997, he was found deportable by an immigration judge, and the decision was affirmed by the Board of Immigration appeals. On July 23, 2002, *in Agyeman v. INS*, 296 F.3 d 871 (9th Cir. 2002), from which the foregoing facts are taken, we reversed the Board of Immigration Appeals, holding that Agyeman had not received a full and fair hearing, and remanded.

Meanwhile, on February 4, 1997, prior to the immigration judge's ruling, Agyeman had been detained by the Immigration and Naturalization Service (the INS) and thereafter placed in custody in various correctional institutions, some of them operated by the Corrections Corporation of America (the Corrections Corporation), a private company employed by the federal government. On June 10, 1999, he initiated this litigation in response to the treatment he received from his custodians. On October 25, 1999, Agyernan was allowed to proceed in forma pauperis. In a Screening Order dated that day, the district court pointed out various glaring deficiencies in his complaint. In response, on November 5, 1999, Agye-

man filed his first amended complaint. On February 9, 2000, several of his claims were dismissed by the court without prejudice. His motion to file a second amended complaint was affirmatively recommended by the magistrate judge to whom the case had been assigned, but only after the excision of several claims and defendants. These recommendations were adopted by the district court on January 4, 2001.

Earlier, on November 13, 2000, the magistrate judge had denied without prejudice Agyeman's motion to appoint counsel. The magistrate judge stated: "Plaintiff has failed to show that any difficulty he is experiencing in attempting to litigate this case is derived from the complexity of the issues involved." No constitutional right to counsel was at stake, the magistrate judge ruled, because the "case is beyond the pleading stage."

At the center of Agyeman's case were these allegations:

> On October 11, 1998, Plaintiff, a pretrial detainee, at Corrections Corporation of America, Central Arizona Detention Center in Florence Arizona was beaten by Captain Lopez, the Shift Supervisor, Lt. Egber and a Sgt. "John Doe". Whilst in full mechanical restraints in preparation for being transported to Casa Grande Medical Center in an Emergency the Prison Medical Unit believed was a cardiac arrest, Plaintiff was nonetheless knocked to the floor by Captain Lopez, Lt. Egber and a Sgt. "John Doe" for refusing to comply with an order and wasting their time. Plaintiff barely was conscious.
>
> Plaintiff suffered pain and anguish; three broken teeth; loss of blood and several bruises. Plaintiff suffered torture from being restrained in an unnatural position in a locked cell and fastened to a bed for several hours (At least 12 hours) calculated to inflict pain.

Agyeman's motion to file a third amended complaint was denied.

The case went to trial and after three and one half days, on May 2, 2003, the jury found in favor of the defendants. On June 25, 2003, the district court denied Agyeman's motion for relief under Fed. R. Civ. P. 60(b)(3), his motion for a new trial, and his motion for judgment as a matter of law.

Agyeman appealed in forma pauperis. The district court certified that the appeal was not taken in good faith and revoked this status. A motions panel of this court reviewed the record and ruled that Agyeman was entitled to this status for this appeal. This court also granted Agyeman's motion for appointment of pro bono counsel to represent him.

ANALYSIS

In proceedings in forma pauperis, the district court "may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). The decision to appoint such counsel is within "the sound discretion of the trial court and is granted only in exceptional circumstances." *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of the exceptional circumstances of the plaintiff seeking assistance requires at least an evaluation of the likelihood of the plaintiff's success on the merits and an evaluation of the plaintiff's ability to articulate his claims "in light of the complexity of the legal issues involved." *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

Agyeman's case brought against Corrections Corporation and its employees, had a triple complexity. First, to the extent that Agyeman sought to hold Corrections Corporation itself liable, the case could not be brought under *Bivens*, 403 U.S. 388, since Corrections Corporation is a private corporation. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (declining to apply *Bivens* to private corporations). Rather, Agyeman could have brought a suit against the United States under the Federal Tort Claims Act, 28 U.S.C.

§§ 1346(b)(1), 2671-2680; *United States v. Muniz*, 374 U.S. 150 (1963). Alternatively, he could have sued the corporation directly in tort and he could have sought injunctive relief. *See Malesko*, 534 U.S. at 72-74 (discussing alternative options for federal prisoners in private prisons). Agyeman would have had the option of bringing this suit against Corrections Corporation by joining the latter as a defendant in the suit under the Federal Tort Claims Act and requesting the district court to exercise supplemental jurisdiction over this defendant. 28 U.S.C. § 1367; *see* Lester S. Jason & Robert C. Longstreth, *Handling Federal Tort Claims* §§ 6.02-.03 (2004).

Second, to the extent that Agyeman sought recovery from individual employees of the Corrections Corporation, the case had to brought as a *Bivens* action. *Bivens*, 403 U.S. 388. Third, to the extent that Agyeman's status as a person being held on noncriminal charges enhanced his rights beyond those of an ordinary criminal prisoner, an issue was presented whether the standard Bureau of Prison rules governing the transfer of prison inmates were applicable to him.

The district court in its ruling on his second amended complaint did inform Agyeman of the peculiar position of the Corrections Corporation; but the court did not give him the opportunity to use the information. As to the nature of his action against the employees, not only did Agyeman misconceive it to be a section 1983 action against state employees, but neither the magistrate judge nor the district judge caught the error. Only on appeal was it noted by counsel for Corrections Corporation. Finally, at no point did Agyeman gain access to what Corrections Corporation on appeal has argued is the decisive standard for the restraints put on him prior to transfer for treatment of his emergency medical condition: the 16 pages of the Federal Bureau of Prisons' regulations of December 23, 1996, entitled "Escorted Trips," regulations on their face applicable to felons and innocent detainees alike.

Agyeman, it is obvious from his pleadings, is literate and educated. He was able to read statutes and legal literature. But he lacks legal training. As is evident from the record, a lawyer attentive to differences would have noticed that Agyeman should have sued the employees under *Bivens*, and the United States and the corporation under the Federal Tort Claims Act. Instead, he was left to articulate a case where, if he had prevailed before the jury, the defendants would have successfully moved for judgment as a matter of law on the ground that they could not be sued as state actors. Without gaining access to the federal prison regulations, Agyeman could not establish that the treatment he alleged that he received was or was not contrary to what was required by the United States as to noncriminal detainees. Without a lawyer, Agyeman not only did not think of obtaining this information but did not advance any coherent theory for subjecting Corrections Corporation to liability. His case, in short, was complex. The circumstances were exceptional. The magistrate judge who ruled on Agyeman's request for counsel knew very little of the likelihood of his success on a claim that had not been properly framed.

A further fact, enhancing the exceptional character of the case, is the anomaly of incarcerating a person on noncriminal charges and confining him for seven years. Such incarceration may be a cruel necessity of our immigration policy; but if it must be done, the greatest care must be observed in not treating the innocent like a dangerous criminal. Is there any warrant for shackling the feet and binding the chest of an innocent detainee? It requires legal skill to frame this issue and distinguish Agyeman's case from that of the ordinary transferee taken by the Bureau of Prisons on an Escorted Trip.

Because Agyeman was denied counsel, the judgment in his case must be VACATED. The case is REMANDED for proceedings consistent with this opinion, including the appointment of counsel by the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

[Filed Nov 13, 2000]

CV-99-1366-PHX-PGR (JI)

EMMANUEL SENYO AGYEMAN,
Plaintiff(s)

vs

CORRECTIONS CORPORATION OF AMERICA, ET AL.,
Defendant(s)

ORDER RE MOTION TO APPOINT COUNSEL

On August 24, 2000, Plaintiff filed a "Motion to Appoint Counsel" [Dkt 46], seeking appointment of counsel based upon (1) lack of library and other facilities at the Maricopa County Jail, (2) Plaintiff's loss of his legal papers, and (3) his need to depose the opposing parties.

Under the controlling law in the Ninth Circuit, neither the Constitution nor 28 U.S.C. § 1915(d) justify appointment of counsel for Plaintiff.

1. No Constitutional Right to Counsel

There is no constitutional right for an indigent to have appointed counsel in a civil case. *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); accord *Randall v. Wyrick*, 642 F.2d 304 (8th Cir. 1981).

2. Constitutional Right of Access to Courts Does Not Require Appointment

Plaintiff is beyond the point in this case where Plaintiffs' "right of access" requires appointment of counsel. It is estab-

lished "beyond doubt" that prisoners have a constitutional right of access to the courts, *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 1494 (1977), that is "adequate, effective, and meaningful." *Id.* at 822, 97 S.Ct. at 1495.[1]

It is true that the "right of access" can require access to a law library. In *Bounds*, the Court posed the question as "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825, 97 S.Ct. at 1496. The Court noted that if the state files a response to a *pro se* pleading, "it will undoubtedly contain seemingly authoritative citations" and without a library, an inmate will be unable to rebut the state's argument. *Id.* at 826, 97 S.Ct. at 1497. The Court therefore held, "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828, 97 S.Ct. at 1498. However, "[i]nsofar as the right vindicated by *Bounds* is concerned, meaningful access to the courts is the touchstone', and the inmate must therefore demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. *Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 2180 (1996) (citations omitted). The Constitution does not require that prisoners be able to "conduct generalized research, but only

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[1] The Plaintiff is not precluded from seeking assistance from fellow inmates. In *Johnson v. Avery*, 89 S.Ct. 747 (1968), the Supreme Court held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation barring inmates from furnishing such assistance to other prisoners." *Id.* at 751. In *Wolff v. McDonnell*, 94 S.Ct 2963, 2985-88 (1974), this holding was unanimously extended to cover assistance in civil rights actions.

that they be able to present their grievances to the courts." *Id.* at 360, 116 S.Ct. at 2184.

The Ninth Circuit has held that the constitutional right of access to the courts requires that the state provide assistance only through the pleading stage, including preparation of a reply to an answer, if the court orders a reply. *Cornett v. Donovan*, 51 F.3d 894, 899 (1995). This case is beyond the pleading stage and accordingly Plaintiff's right of access is not at issue.

3. Limited Discretion to Appoint Counsel under 28 U.S.C. § 1915(d)

28 U.S.C. § 1915(d) confers on the court the discretion to appoint counsel to represent an indigent civil litigant. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); *Aldabe*, 616 F.2d at 1093; but this circuit has limited the exercise of that power to "exceptional circumstances", based upon such factors as the likelihood of success on the merits and the ability of the plaintiff to articulate his claims in light of their complexity. *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990). Neither of these factors is dispositive and both must be viewed together before reaching a decision on a request for counsel under section 1915(d). *Wilborn*, 789 F.2d at 1331.

Likelihood of Success: Here, Plaintiff has not yet demonstrated a likelihood of success on the merits.

Complexity: In addition, Plaintiff has failed to show that any difficulty he is experiencing in attempting to litigate this case is derived from the complexity of the issues involved. While most actions, such as the instant case, require development of supporting facts during litigation and a pro se litigant will seldom be in a position to investigate easily the facts to support the case, it should be noted that a demonstration of the need to develop the facts to support a case is not sufficient

to establish successfully the complexity of the relevant issues. *Id.*

The grounds cited by Plaintiff do not alter this conclusion. As to Plaintiff's complaint on the lack of law library facilities at the Maricopa County Jail, the Court notes that Plaintiff has apparently been relocated to an I.N.S. facility in Florence, Arizona. As to the loss of Plaintiff's legal papers, the Court is addressing this issue by separate order on Plaintiffs "Motion to Return Legal Papers" [Dkt 47]. Finally, as to the desire to depose opposing parties, the Court notes that the order filed April 21, 2000 [Dkt 24], precludes Plaintiff from deposing a party without leave of the court. Even if Plaintiff seeks and obtains leave to take such depositions, such depositions would not be of such an extraordinary or complex nature as to justify a departure from the principles expressed in Wilborn, *supra*.

IT IS THEREFORE ORDERED that Plaintiff's "Motion to Appoint Counsel" [Dkt 46] is denied without prejudice.

DATED: November 7, 2000

/s/ JAY R. IRWIN
Jay R. Irwin
United State Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan. 13, 2005]

No. 03-16068
D.C. No. CV-99-01366-PGR
District of Arizona, Phoenix

EMMANUEL SENYO AGYEMAN,
Plaintiff-Appellant,

v.

CORRECTIONS CORPORATION OF AMERICA; *et al.*,
Defendants-Appellees.

ORDER

Before: B. FLETCHER, NOONAN, and THOMAS, *Circuit Judges.*

Judge Thomas has voted to deny petition for rehearing en banc and Judges Fletcher and Noonan recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.